IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 17TH SEPTEMBER 2007 / 26TH BHADRA 1929

SA.No. 764 of 1993(G)

AS.71/1987 of SUB COURT, TIRUR
OS.79/1979 of MUNSIFF COURT, TIRUR
.....

APPELLANT: IN SA./ APPELLANT IN AS./ PLAINTIFF IN OS.

ENDEENKUTTY, S/O. POTTAMMAL
VAKAYIL SAIDALI , AGED 49,
BY POWER OF ATTORNEY HOLDER,
ABDURAHIMAN, S/O. POTTAMMAL
VAKAYIL SAIDALI, RESIDING AT KOLAKKAD,
KUTTIPPURAM P.O.,
AMSOM IN TIRUR TALUK,
MALAPPURAM DISTRICT 679 571.

BY ADV. SRI.S.V.BALAKRISHNA IYER
SRI.K.JAYAKUMAR
R.VIJAYAGOPAL

RESPONDENTS: IN SA. / RESPONDENT IN AS./ DEFENDANT IN OS.
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1. **SUBRAMANIAN, S/O. KOPPARAMBATH KUNHAN,**
RESIDING IN KUTTIPPURAM AMSOM,
IN TIRUR TALUK, MALAPPURAM DISTRICT,
KOLLAKKAD, KUTTIPPURAM P.O. (DIED)

2. **SARADA, W/O. SUBRAMANIAN,**
RESIDING IN KUTTIPPURAM AMSOM
TIRUR TALUK, MALAPPURAM DIST., KOLLAKKAD
KUTTIPPURAM P.O.

tss

SA. NO.764/1993

**3. KUNHIKKALI, D/O. KOPPARAMBATH KUNHAN,
RESIDING AT KUTTIPPURAM AMSOM,
TIRUR TALUK, MALAPPURAM DISTRICT,
KOLAKKAD, KUTTIPPURAM P.O.**

THE LEGAL REPRESENTATIVES OF DECEASED 1ST RESPONDENT.

**R4. MANOJ, S/O. SUBRAMANIAN, AGED 23,
RESIDING AT KUTTIPPURAM AMSOM,
TIRUR TALUK, MALAPPURAM DISTRICT,
KOLLAKKAD, KUTTIPPURAM P.O.**

R5. MANIKANDAN, S/O. DO. AGED 21, DO. DO.

R6. SOBHANA, D/O. DO. AGED 18, IN DO. DO.

R7. MINOR RAJESH, S/O. DO. AGED 16, IN DO. DO.

R8. MINOR SAJI MOL, D/O. DO. AGED 12, IN DO. DO.

MINOR R7 & R8 ARE REP.BY GUARDIAN MOTHER R2.

THE LEGAL REPRESENTATIVES OF DECEASED 1ST RESPONDENT ARE IMPLEADED AS ADDL.RESPONDENTS 4 TO 8 AS PER ORDER DT. 16.8.07 IN IA. 2010/06.

BY ADV. SRI.P.V.SURENDRANATH

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 17/09/2007, ALONG WITH SA NO. 498 OF 1993 SA NO.787 OF 1993 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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S.A.Nos. 787, 498 & 764 OF 1993

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DATED THIS THE 17th DAY OF SEPTEMBER, 2007

JUDGMENT

Plaintiffs in O.S.79 of 1979, 80 of 1979 and 81 of 1979 on the file of Munsiff Court, Tirur are appellants. Respondents are the defendants. Case of all the appellants and respondents is common. According to appellants, plaint schedule property forms part of Kavungal Paramba having an extent of 96 cents in Survey No.207/1B. Their case is that plaint schedule property, along with other properties originally belonged to Saidali as item No. 38 of Ext.A1 partition deed and thereafter on the death of Saidali, the properties were divided between the legal heirs including appellants and as item No.13, plaintiff in O.S.81 of 1979 was alloted plaint schedule property therein and as item No.21, plaintiff in O.S.79 of 1979 was alloted the plaint schedule property therein and as item No.31, plaintiff in O.S.80/1979 was alloted the plaint schedule property therein and apart from that Hydrose, their brother was alloted a part of the property as item No.25. It was contended that respondents have no manner of right or possession of the suit properties but they are in unlawful possession of the plaint schedule properties and filed O.A.417 of

1975 before Land Tribunal Kuttippuram and it was dismissed under Ext.A2 order and though an appeal was filed before Appellate Authority, it was also dismissed under Ext.A3 order and appellants are entitled to recover possession of the respective plaint schedule properties on the strength of their title. Respondents, in their written statement contended that Saidali did not have any title to the plaint schedule properties and as legal heirs, appellants did not derive any title to the properties and they are not entitled to recover possession of the same. It was contended that Kunhan, father of first defendant got entrustment of the property from Saidali along with other properties as per Ext.B1 registered Kachit 1443/1946 and Kunhan constructed a house therein and the resurvey number of the property shown is not correct and the entire property is lying as one plot with fence on the east and south and compound wall on the north and west and appellants have no title to the said property and the property originally belonged to jenmi Vettithatrakkal Mangattuparambil Ummayyathumma and Saidali was an intermediary and application filed before the Land Tribunal was dismissed for the reason that all the legal heirs of Kunhan were not impleaded and appellants are therefore not

entitled to the decree for recovery of possession sought for.

2. As the identity of plaint schedule property was disputed, a Commission was taken out by appellants. All the suits were tried jointly. The Commissioner submitted a report and plan. They were subsequently set aside on an application filed by appellants finding that Commissioner did not properly identify the properties. An experienced Commissioner was thereafter appointed and he submitted Ext.C1 report and C2 plan. Learned Munsiff, on the evidence of PW1, Dws 1 and 2, Exts.A1 to A4 and Exts.B1 to B10, found that appellants did not establish either the identity or their title to the plaint schedule properties. It was found that the Commissioner could not identify the plaint schedule properties as the properties claimed by appellants under Ext.A4 partition deed and the survey number, boundaries and the measurement do not tally. Learned Munsiff also found that appellants did not establish their title to the property. He dismissed the suit. Appellants challenged the decree and judgment before Sub Court, Tirur in A.S.Nos.71 of 1987, 72 of 1987 and 73 of 1987 respectively. Learned Sub Judge, on reappreciation of evidence, found that appellants can succeed in the suits only on establishing their title and the right obtained

under Ext.A4 is the right obtained by Saidali under Ext.A1 and the title obtained under Ext.A1 is derived under a partition but the anterior title deed establishing the title over the property to be divided between the sharers was not produced or proved and therefore appellants did not establish their title. Learned Sub Judge, on reappreciation of evidence also found that report of the Commissioner shows that Ext.A1 and A4 do not prove that plaint schedule properties are the properties alloted to the appellants and Hydrose as item Nos. 13, 21, 25 and 31 of Ext.A4 and held that appellants are not entitled to the decree sought for. The appeals were dismissed. The decree and judgment of the first appellate court are challenged respectively in S.A.787 of 1993, 498 of 1993 and 764 of 1993.

3. The second appeals were admitted formulating the following substantial questions of law.

1)Whether in a suit for recovery of possession on the strength of title, when plaintiffs prove their title by producing title deeds and Commissioner identified the properties tallying with the survey number, was it correct for the courts below to non-suit the plaintiffs on the ground that the extent does not tally with the plaint schedule properties,

2)Whether courts below were justified in holding that respondents perfected title by adverse possession, when the title of appellants is not admitted.

4. Learned counsel appearing for appellants and respondents were heard.

5. The argument of the learned counsel appearing for appellants is that courts below did not properly appreciate the pleading and the evidence. It was argued that the specific case of appellants is that plaint schedule properties is item No.38 of Ext.A1 partition deed whereunder Saidali obtained title to the property and on his death, it was divided under Ext.A4 partition deed and as item Nos. 13, 21 and 31, plaint schedule properties in O.S.81 of 1979, O.S.79 of 1979 and O.S.80 of 1979 were respectively alloted to the respective plaintiffs and as item No.25, the remaining property was alloted to Hydrose and the total extent is 96 cents and including the properties alloted to the other brothers as item Nos. 38 and 66, the total extent would be one acre thirty cents and courts below should have found that appellants have title to the plaint schedule properties. It was also argued that Ext.A6 Adangal extract of R.S.No.207/1B which was admitted as additional evidence by the first appellate court

establish that Saidali had title to the said one acre thirty cents and evidence of Dws 1 and 2 establish that the property which lies to the east of the plaint schedule property is also known as Kavungal Paramba and when plaint schedule properties with the property of Hydrose would be 96 cents, courts below should not have found that appellants have no title. It was further argued that though the southern boundary was not shown as Edavazhi, other boundaries tally and in such circumstances, finding of courts below that plaint schedule properties were not identified as the properties obtained under Ext.A4 is not sustainable. Learned counsel also argued that Commissioner did not properly identify the plaint schedule properties in Ext.C1 plan and C2 report and for that reason appellants cannot be non-suited. Learned counsel further argued that when first respondent claimed that he is a tenant under the appellants in O.A.417 of 1975, as evidenced by Exts.A2 and A3 orders, they cannot dispute the title of appellants and in such circumstances, courts below should have granted the decree. It was then argued that when respondents in their written statement did not admit the title of appellants, courts below should not have found that they have perfected their title by adverse possession and there is no

evidence to prove that respondents have perfected title by adverse possession.

6. Learned counsel appearing for respondents argued that both trial court and first appellate court elaborately considered the question of identity and as per Exts.A1 and A4, the property obtained by Saidali and thereafter by appellants is in Survey No.202/2 and not Survey No.R.S.207/1B and the boundaries also do not tally and no substantial question of law is involved in the appeals.

7. As per Ext.A1 and A4, the east-west measurement of the property is 58 six feet Koles and north- south measurement is 20 koles. As per Ext.C2 report east-west measurement of the disputed property is 48 koles and north-south measurement is 34 ½ koles. Courts below found that measurements do not tally. It is admitted case that southern boundary of the disputed plaint schedule properties is an old Edavazhi; but neither Ext.A1 nor Ext.A4 shows Edavazhi as the southern boundary. Instead, the southern boundary is shown as Kavungal Paramba. The Commissioner also found that southern boundary is not Kavungal Paramba. Courts below, relying on the evidence of DW2 found that he is in possession of the southern property and it is not

Kavungal Paramba. It is in such circumstances courts below found that neither the survey number nor the measurement nor the boundaries of the property tally with the boundaries shown in Exts.A1 and A2 and appellants did not establish that plaint schedule properties are the properties obtained by them as item Nos. 13, 21, 25 and 31 of Ext.A4 partition deed. Though learned counsel argued that Commissioner did not properly identify the properties, from the records it is clear that Ext.C1 and C2 were submitted after the first report and plan were set aside by the trial court at the instance of appellants. In spite of the posting for filing objections to Ext.C1 and C2, no objections were filed. The Commissioner was also not examined to challenge the correctness of Ext.C1 and C2. Hence appellants cannot dispute the correctness of Ext.C1 and C2 at the second appellate stage.

8. As rightly pointed out by learned counsel appearing for appellants, even if it is taken that plaint schedule properties are the properties covered under Ext.A4 partition deed, when the suit is for recovery of possession on the strength of title and the title is disputed, without establishing the pre-existing title by producing anterior title deeds, appellants cannot succeed in the suits. In spite of the dispute with regard to their title,

appellants did not produce the anterior title deeds and establish that properties divided under Ext.A1 and Ext.A4 belong to the family of Saidali and thereby they derived title to the properties. In such circumstances, finding of courts below that appellants did not establish the title is perfectly correct. Though learned counsel argued that Ext.A6, the additional document received at the appellate stage establish that one acre thirty cents in R.S.207/1B is registered in the name of Saidali, as rightly found by first appellate court, entry in the Adangal extract by itself will not establish title as Adangal extract is not a document of title. The fact that appellants were impleaded as respondents in the O.A filed by respondents for purchase of jenmom right before Land Tribunal will not establish title of the appellants when first respondent, the applicant in the S.A did not implead appellants and they were impleaded later and when Land Tribunal did not find that appellants are the landlords. In such circumstances, there is no merit in the appeals. Appeals are dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

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